IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 220 of 2005

Ashok Kumar Moitra
S/o Sri Kedar Nath Moitra
R/o Vijay Vihar, 627 Irvin Road
Faithful Gunj, Kanpur Cantt.
U.P. at present R/o Tihar House
154, Civil Lines, Bareilly, U.P. .....Applicant

Versus

1. State of Uttaranchal
2. Adarsh Kumar Moitra
   S/o Late Sri Kedar Nath Moitra
   R/o 6 Race Course, Dehradun .....Respondent

Hon'ble Prafulla C. Pant, J

Heard Shri Vivek Shukla, learned counsel for the applicant, Shri Dinesh Chauhan, learned counsel for respondent No. 2 and learned A.G.A. for the State.

2. By means of this petition, moved under Section 482 of Code of Criminal Procedure, 1973 (for brevity herein after referred as Cr.P.C.) the petitioner has sought quashing of the proceedings in criminal complaint case No. 1965 of 2004 Adarsh Kumar Moitra V. Ashok Kumar Moitra, relating to offence punishable under Section 138 of Negotiable Instruments Act, 1881 pending in the court of Judicial Magistrate/First Additional Civil Judge (Jr. Div.), Dehradun.

3. Brief facts of the case are that a complaint was filed by respondent No. 2 against the petitioner before the trial court with the allegations that the petitioner, issued cheque No. 006684 dated 27.07.2004, drawn on

Allahabad Bank, Faithfulganj Branch, Kanpur for Rs. 36,00,000/- against account No. 399 of said bank. The cheque was bounced with the endorsement of the bank – "NO ACCOUNT". It is further alleged in the complaint that the account was closed by the petitioner.

4. Section 138 of Negotiable Instruments Act, 1881, provides that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque or with both.

5. Learned counsel for the petitioner, challenged the criminal proceedings before the trial court in which the petitioner was summoned on the ground that the ingredients of the offence, punishable under Section 138 of aforesaid Act, are not made out. In this connection, it is argued that a copy of complaint (Annexure-1 to the petition) does not disclose what was the debt or liability, which was required to be discharged by the petitioner. In this connection it is further submitted that the petitioner and respondent No.

2 are real brothers, who had a partnership business during the life time of their father. Regarding the account No. 399, it is pointed out by the learned counsel for the petitioner that said account was lying closed since 1995, as is clear from Annexure -9 and Annexure-10 to the petition.

6. From the perusal of the complaint (Annexure-1) it is also clear that bank had returned the cheque not on the ground of insufficiency of funds or on the ground that the amount in the cheque exceeds the amount arranged to be paid from that account by an agreement made with the bank. As such, the two necessary ingredients for disclosing the offence, punishable under Section 138 of Negotiable Instruments Act, 1881, are not made out, as it is neither shown that what was the liability required to be paid by the petitioner nor is it shown that the cheque was dishonoured for insufficiency of funds. Learned counsel for respondent No. 2, drew attention of this Court to the provision contained in Section 139 of the aforesaid Act and also referred to principle of law laid down in ***Hiten P. Dalal V. Bratrindranath Banerjee 2001 (43) ACC 325*** and contended that the presumption of liability is in favour of the holder of the cheque. It is true that presumption is required to be drawn under Section 139 of Negotiable Instruments Act, 1881, but the presumption would arise only if the complaint discloses that there was liability of particular amount of which cheque was issued.

7. For the reasons, as discussed above, since the ingredients of the offence punishable under Section 138 of Negotiable Instruments Act, 1881, are not made out, as such, the impugned criminal proceedings in criminal complaint case No. 1965 of 2004, between the parties, pending before the trial court, are liable to be quashed. The petition under Section 482 Cr.P.C. is allowed. The criminal complaint case No. 1965 of 2004 Adarsh Kumar Moitra V. Ashok Kumar Moitra, relating to offence punishable under Section 138 of Negotiable Instruments Act, 1881, pending before the Additional Civil Judge (Jr. Div.)/ Judicial Magistrate, Dehradun, are hereby quashed with the observation that respondent No. 2 would be at liberty to seek other legal remedy, available to him.

Dt. 26.09.2006 **(Prafulla C. Pant, J.)**

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